No. 82-1608

IN THE

Supreme Court of the United States

October Term, 1983

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Petitioner,
v.
ESTHER WUNNICKE, Commissioner of Department of Natural Resources of the State of Alaska, et al.,,
Respondents,
KENAI LUMBER COMPANY, INC.
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF STATE RESPONDENTS

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QUESTIONS PRESENTED

1. Was the United States Court of Appeals for the Ninth Circuit correct in concluding that Congress had affirmatively endorsed, and thereby removed from the negative implications of the Commerce Clause, Alaska's requirement of in-state primary manufacture for timber purchased from the state?

2. Do the negative implications of the Commerce Clause apply, in any event, to a state's decision to restrict sales of its publicly owned timber to purchasers who agree to comply with its in-state primary manufacturing requirement?

3. If the negative implications of the Commerce Clause do apply to a state's decision to restrict its timber sales to purchasers who agree to comply with its in-state primary manufacturing requirement, does such a requirement run afoul of the Commerce Clause, given the unique facts and circumstances underlying federal and state timber policy in Alaska that have supported such a requirement for more than 50 years?

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STATEMENT OF THE CASE

For the past half-century, the federal government has singled out Alaska as the object of an unwavering timber policy to encourage the growth of the state's local wood processing industry. The policy was designed both to foster the development of the Alaska economy and to provide adequate wood processing capacity for timber from national forests in Alaska. *See* C. Kerr and M. Wibbenmeyer, *Alaska Log Export Policy* (1979), Clerk's Record [hereinafter "CR."] 4, Ex. 11, at 11, 16-17, 41-42 [hereinafter "Kerr Study"]; G. Lindell, *Log Export Restrictions of the Western States and British Columbia* (1978), J.A. 104a-107a [hereinafter "Lindell Study"].

The federal government's unprocessed timber export policy for Alaska was first enunciated in 1928 when virtually all of Alaska was in federal ownership. In that year, the Secretary of Agriculture adopted as policy the

recommendation of the Chief Forester of the United States Forest Service that no timber harvested from national forests in Alaska should be exported from Alaska in unprocessed form without the prior consent of the Regional Forester. *Lindell Study*, J.A. 105a. *See* 36 C.F.R. § 221.2 (1939). At the time there were two national forests in Alaska: the Tongass, covering all of Alaska's southeastern panhandle, and the Chugach, covering most of southcentral Alaska.[1] Eventually, the Forest Service adopted regulations to encourage local wood processing industry development in the territory by severely limiting the conditions under which Alaska exports could occur. 36 C.F.R. § 221.3(c) (1949); *Kerr Study*, CR. 4, Ex. 11, at 28. Those regulations, and the factors motivating them, remain substantially intact today. *See* 36 C.F.R. § 223.10(c) (1982), reprinted at Pet. App. 32a-36a.

As both Congress and the Executive branch have recognized, Alaska has long been considered "a special case" for purposes of federal timber policy and the development of in-state timber milling capacity.[2] Federal authority has

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1. The Act of June 4, 1897, ch. 2, § 1, 30 Stat. 11, 35, 16 U.S.C. § 476 (repealed 1976) authorized the sale of timber on national forests "to be used in the State or Territory in which such timber may be situated, respectively, but not for export therefrom." Beginning with the Act of March 3, 1905, Pub. L. No. 138, ch. 1405, 33 Stat. 861, 873, making the annual appropriation to the Department of Agriculture, Congress waived the Act of June 4, 1897's prohibition on timber exports from forest reserves, and did so annually thereafter. *See* H.R. Rep. No. 208, 69th Cong., 1st Sess. 1-3 (1926). The creation of the Tongass and Chugach National Forests began in 1902 and 1907, respectively, with the issuance of the first in a series of executive orders that slowly expanded the size of the forests. Proclamation No. 37, August 20, 1902, 32 Stat. 2025; Proclamation of July 23, 1907, 35 Stat. 2149. In 1926, Congress made permanent its annual waiver of the forest reserve export prohibition, subject to the proviso that the Secretaries of Agriculture and Interior make a finding that the supply of timber for local use was adequate, apparently a determination never made one way or the other until 1968. *See* Act of April 12, 1926, 16 U.S.C. § 616 (1974), and Note 3 *infra*.

2. *Effect of Lumber Prices and Shortages on the Nation's Housing Goals*, S. Doc. No. 27, 91st Cong., 1st Sess. 55 (1969). And *see Alaska - Its Resources And Development - Message From the President of The United States, Franklin D. Roosevelt*, H. R. Doc. No. 485, 75th Cong.,

long existed for the extension to other states of limitations similar to those imposed upon the exportation of unprocessed timber cut in Alaska. Organic Administration Act of June 4, 1897, 16 U.S.C. §§ 476, 551 (repealed 1976). Nonetheless, for 40 years, the only state or territory that was in fact subject to a federal in-state (or in-territory) primary manufacturing requirement was Alaska. In other states, unprocessed timber from national forests had been freely exported, notwithstanding 1926 federal legislation that allowed the exportation of timber taken from national forests *only* upon a finding that "the supply of timber for local use will not be endangered thereby." Act of April 12, 1926, 16 U.S.C. § 616 (1974). Indeed, it was concern over foreign exports of timber from states other than Alaska that finally led Congress in 1968 to enact legislation placing a 350 million board foot quota upon the sale for export of unprocessed timber from federal lands located west of the 100th meridian (a line running roughly from the middle of North Dakota through central Texas).[3]

Although Alaska was included within the scope of the 1968 legislation extending the restriction on the export of unprocessed timber to other states (the "Morse

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Footnote 2 (con't)

3rd Sess. 20-21, 98-101 (1938); *Plywood Supply In Alaska - Letter From The Secretary Of The Interior*, S. Doc. No. 120, pt. 2, 71st Cong., 2d Sess. 9 (1931) ("The timber resources of the Tongass National Forest are managed by the United States Forest Service primarily for the development and maintenance of a permanent pulp and paper manufacturing industry ....")

3. As explained in the Senate Report accompanying the legislation:

> In recent years, foreign purchasers of federally owned unprocessed timber have bid up prices thereby contributing to skyrocketing domestic lumber prices and forced the closure of many mills in the northwestern United States which could not obtain enough timber to remain in business ....
>
> There is no record of any finding of surplus having been made within the last 20 years, despite the requirement of the 1926 Act.

S. Rep. No. 1479, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S. Code Cong. & Ad. News 3957, 3971.

Amendment"[4]), the legislation was not intended to modify pre-existing federal timber policy in Alaska. Nor was it construed to do so. Alaska continued to be treated as "a special case", as it had been since 1928. Thus, the Secretaries of the Interior and Agriculture allocated the entire 350 million board feet of exempted volume to states other than Alaska. *Lindell Study*, J.A. 105a. This reflected the view that Alaska's timber should generally remain subject to the in-state primary manufacturing requirement for purposes of maintaining the state's wood processing industry.[5] In 1973, when the Morse Amendment was replaced by the first of a series of riders to Interior Department appropriation bills which effected a complete ban on the export of unprocessed timber from federal lands in the West, the rider applied only to lands "in the contiguous 48 States," thereby excluding Alaska. *See Department of the Interior and Related Agencies Appropriation Act, 1974*, Pub. L. No. 93-120, § 301, 87 Stat. 429; *Department of the Interior and Related Agencies Appropriation Act, 1983*, Pub. L. No. 98-146, § 302. Federal timber policy toward Alaska, however, remained unchanged, and continued in effect through successive Forest Service regulations. 36 C.F.R. § 221.3(c) (1949); 36 C.F.R. § 223.10(c) (1982).

When Alaska was admitted to the Union in 1958, Congress granted it approximately 104 million acres of land, which the state was to select over the course of the next 25

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4. Pub. L. No. 90-554, § 401, 82 Stat. 966, 16 U.S.C. § 617 (1969). In addition to providing a quota for the export of unprocessed timber from the West, the Morse Amendment provided for the Secretaries of the departments administering federal lands to declare specified amounts of unprocessed timber as surplus to domestic needs and thus eligible for export. *Id.*

5. As a result of a hearing held in Juneau on May 5, 1969, Alaska cedar and western red cedar were declared surplus on federal lands in Alaska and thus eligible for export. *Lindell Study*, J.A. 97a. By mid-1976, however, with indications that the surplus of western red cedar in Alaska was decreasing, the Forest Service began to require proof that logs had been first offered for sale to domestic manufacturers before considering export applications and, shortly thereafter, it established that Alaska western red cedar was no longer in surplus and would be exportable only if in-state primary manufacturing requirements were satisfied. *Lindell Study*. J.A. 106a.

years.[6] Congress hoped that the extraordinary land grant to the state, largely undeveloped, would provide an adequate resource base upon which the state could develop local industry and become master of its own destiny.[7] In fashioning its own policy toward certain forested tracts it received from the federal government, the fledgling state sought guidance in the long standing federal policy toward publicly owned lands in Alaska, the objective of which was the broadening of Alaska's economic base by "broadening the processing base, not the logging base." *Kerr Study*, CR. 4, Ex. 11, at 39. This federal policy and objective thus became shared in common with the new state government.[8]

Consequently, in 1960 the state adopted an in-state primary manufacturing requirement that differed little in substance from the preexisting and continuing federal requirement. Alaska Admin. Code tit. 11, § 76.130 (July 20, 1960, repealed 1982), reprinted at Pet. App. 20a. Depending on the log's quality, a processor can satisfy the primary manufacturing requirement by making cants, slabs, planks, pulp, green veneer for plywood, poles or piling, or chips. Pet. App. 20a.

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6. Statehood Act, 48 U.S.C. note preceding § 21 (as amended, 1980). In 1980, due to the very slow pace of patenting of lands to Alaska, Congress extended the 25 year period to 35 years.

7. As the House Report accompanying the Statehood Act, H.R. Rep. No. 624, 85th Cong., 1st Sess. 8 (1958) observed:

> H.R. 7999 will enable Alaska to receive full equality with existing States not only in a technical juridicial sense but in practical economic terms as well. It does this by making the new State master in fact of the natural resources within its borderlines ....
>
> * * * *
>
> [A] long list of potential basic industries in the Territory, including the forest industries can exist in Alaska only as tenants of the Federal Government, and on the suffrance of various Federal agencies. The committee considers that to be an unhealthy situation.

At the time of Alaska's admission to statehood, the federal government still owned 99% of the land in the Territory of Alaska. *Id.* at 5.

8. The state's declaration of purpose behind the primary manufacturing requirement has taken the form of policy statements of its governors, J.A. 31a-32a, and legislative resolutions, J.A. 30a, 52a.

With limited exceptions, Alaska has steadfastly adhered to this requirement in sales of timber from state lands. And it has seen the salutary results of both the preexisting federal timber sale program and of its own timber sale program in the emergence of local timber processing operations that have contributed to the growth of the state's fragile economic infrastructure. *See* State of Alaska, House of Representatives, Resolve No. 3 (1979), J.A. 52a.

In 1969, Alaska held an auction (called Icy Cape No. 1) for the sale of some 207 million board feet of its timber located in the Icy Bay area on the Gulf of Alaska. South-Central Timber Development Co., Inc.[9], the petitioner here, was the only, and winning, bidder at the auction. Contrary to South-Central's assertion at Brief, 5, the sale *was* subject to the state's primary manufacturing requirement, which term was an integral part of the contract and constituted a substantial part of the consideration flowing from South-Central to the state.[10] South-Central honored this requirement for the first eight years of the contract.[11] In 1979, South-Central sought a release from the primary manufacturing requirement because it chose not to invest the necessary capital to comply with the state's air pollution control laws at the company's Jakalof Bay mill, where it was processing the timber. There is no evidence in the record that South-Central sought the waiver because it was unable to sell to out-of-state customers the Icy Cape No. 1 timber it primarily manufactured in-state. In consideration for Alaska's waiver of its in-state primary

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9. South-Central is an Alaska domestic corporation. J.A. 5a. In 1980, it was a wholly owned subsidiary of Iwakura-Gumi Lumber Co., Ltd., a Japanese corporation, and had a branch office in Portland, Oregon. J.A. 57a. As of February 1983, it became a wholly owned subsidiary of a Washington corporation. Brief, ii.

10. *See Kenai Lumber Co. v. LeResche*, 646 P.2d 215, 217 (Alaska 1982). Prior to 1978, South-Central received permission to export 3.2 million board feet of spruce in unprocessed form. This limited waiver was the *only* exception to the in-state primary manufacturing requirement granted from 1969 through 1978 in connection with Icy Cape No. 1. *Id.*

11. *Id.* at 217-19.

manufacturing requirement, South-Central agreed to reimburse the state by substantially increasing the contract price for the remaining uncut timber from $7 to $80 per thousand board feet of spruce and from $2 to $28 per thousand board feet of hemlock.[12]

By 1980, a suspension of federal timber sales in Alaska had denuded the market of timber supply, jeopardizing the survival of existing forest product industries in Alaska, including South-Central. *Complaint*, §§ 22-23, J.A. 11a. This greatly concerned the state, since it was heavily dependent on nonrecurring sources of revenue to pay its expenses, and the forest products industry represented a source of recurring revenue from a renewable resource. J.A. 41a. The economic and employment implications caused by the timber shortage prompted the legislature to pass a special $45,800 appropriation to cover the costs of a second Icy Bay area timber sale. 1980 Alaska Sess. Laws, ch. 50, § 130 (1980). Using 26 state employees to prepare for the sale, the state then announced its second Icy Bay auction (called Icy Cape No. 2) for approximately 49 million board feet of timber. J.A. 37a, 41a. As in the past, the state intended to require in-state primary manufacturing as partial consideration for the contract in furtherance of its policy, now two decades old, of developing and sustaining its local wood processing industry. The state recognized, of course, as does the federal government when it administers its own in-state primary manufacturing requirement, that part of the consideration it receives from the purchaser is the agreement to such a requirement, thereby substantially reducing the cash it receives.[13] But the state has made the judgment, as has the federal government, that the creation of local employment

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12. *Id.* at 217 n.1, 218.

13. "In order to make local manufacturing attractive, the Forest Service adjusts stumpage fees downward to offset the high manufacturing costs. This causes total revenues generated from timber sales to be much less than they would be if the export of timber in round log form were permitted." S. Rep. No. 413, 96th Cong., 1st Sess. 225 (1979) (accompanying H.R. 39, Alaska National Interests Lands legislation).

opportunities and the maintenance of a viable local wood processing industry more than offset the additional cash it would receive in the absence of such a requirement.[14]

Before the Icy Cape No. 2 auction was held, South-Central brought suit in federal district court seeking to enjoin the sale on the ground, among others, that Alaska's in-state primary manufacturing requirement violated the negative implications of the Commerce Clause. The district court, while recognizing that congressional consent to state actions removes them from the negative restraints of the Commerce Clause, found no such consent. In reaching its conclusion, the court paid scant attention to the federal government's discrete Alaska timber policy, concluding only that "Congress has not consented to any primary manufacturing requirements imposed by the states." 511 F. Supp. 141, J.A. 131a. Without the benefit of this Court's decision in *White v. Massachusetts Council of Construction Employers, Inc.*, 103 S. Ct. 1042 (1983), the court further decided that the negative implications of the Commerce Clause apply to a state's choice of terms on which it sells its own resources. 511 F. Supp. 142-143, J.A. 131a-133a. Finally, the court summarily concluded that Alaska's in-state primary manufacturing requirement violated traditional Commerce Clause criteria governing state regulations, according little weight to the sensitive interplay of the shared federal and state interests and objectives for Alaska. *Id.* at 143-144, J.A. 133a-135a.

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14. The *Kerr Study* reports:

> Equity considerations concerning export policies are related to who gains and who pays. Taxpayers as a whole bear many costs of public forestry, including costs of non-commodity outputs. Wood purchasers pay for their use of public timber and may pay directly for all its value. To the extent that taxpayers are not receiving . . . the higher revenues possible with export of round logs . . . the current policy is inequitable. However, to the extent that local cantmills are kept running and jobs sustained, it is equitable *if* taxpayers are willing to accept this lower return in exchange for more jobs and processing capacity. (Emphasis in the original.)

CR. 4, Ex. 11, at 49.

The United States Court of Appeals for the Ninth Circuit unanimously reversed. Without reaching South-Central's Commerce Clause claim, the court concluded that "Congress has acted to validate the state policy." 693 F.2d 892, J.A. 142a. Although South-Central asserted that Congress had not been explicit enough in evidencing its approval of Alaska's timber policy, the court responded that there are instances "where federal policy is so clearly delineated that a state may enact a parallel policy without explicit congressional approval, even if the purpose and effect of the law is to favor local interests." *Id.* at 893, J.A. 142a.

On November 17, 1983, the state proceeded with the Icy Cape No. 2 timber auction without insisting on its in-state primary manufacturing requirement. The state made the judgment that the currently prevailing market conditions and unique characteristics of the sale were such that a primary manufacturing requirement would not help develop local industry or create employment. *See* explanatory documents in the appendix to this brief, submitted with the consent of South-Central. Like the federal government, the state nevertheless remains fully committed to its general policy of requiring in-state primary manufacture of its timber, and its regulations retain their force for use in other timber sales as future conditions may warrant.

SUMMARY OF ARGUMENT

1. When Congress has put its imprimatur upon state action, it is well settled that such action is invulnerable to challenge under the negative implications of the Commerce Clause. Congressional policy for Alaska, as implemented by explicit federal agency guidelines, has affirmatively endorsed an in-state primary manufacturing requirement for timber cut from publicly owned lands in Alaska and has thereby removed it from Commerce Clause scrutiny. The federal policy derives from the federal government's recognition that the development of a local wood processing industry in Alaska is in the national interest and that this interest should be protected by requiring in-state primary processing of

timber cut from federal lands in Alaska prior to transportation in interstate or foreign commerce.

The policy is a long standing one, and has been repeatedly reaffirmed by Congress and its responsible agencies. In admitting Alaska to the Union, Congress intentionally created a state government with powers over its own timber land which could be used to double the federal effort to create a timber processing base critical to the development of timber resources inside Alaska. As the court of appeals unanimously concluded, Alaska's own requirement for in-state primary manufacturing of timber purchased from the state "could not be more in keeping with federal timber policy." 693 F.2d 893, J.A. 144a. Given the overwhelming indicia of congressional intent favoring in-state manufacturing, that intent would be frustrated by inflexibly applying a rule of explicitness here, where the applicable state policy and regulations sound "a harmonious note" with the federal policy, *White v. Massachusetts Council of Construction Employers, Inc.*, 103 S.Ct. 1042, 1047 (1983), and reinforce a half-century of carefully designed federal policy for Alaska.

2. Even if Congress had not consented to Alaska's in-state primary manufacturing requirement, the Commerce Clause would not inhibit the state's action. In a series of recent cases, this Court has made it clear that when a state acts as a participant in the market, rather than as its regulator, the negative restraints of the Commerce Clause simply do not come into play. As a seller of its own timber, Alaska has acted as a participant in the market and is free to choose the terms on which it deals with its prospective purchasers.

The distinction South-Central and the Solicitor General propose between natural resources and other state owned goods is neither workable nor constitutionally based, especially in light of the substantial investment the state has made in both managing its timber resources generally, and in preparing for the Icy Cape No. 2 sale in particular. The record is bare of any evidence that the state's requirement impedes the flow of timber out-of-state or affects out of state consumers at all. Indeed, the contrary is true

since Alaska not only creates a flow of timber in the market, but it also chooses to reduce the cash consideration it receives when it sells timber subject to a primary manufacturing requirement in order to, in effect, pay for in-state processing. For analogous reasons, the claim, briefed in detail for the first time in this Court, that Alaska's in-state processing requirement burdens foreign commerce, has no economic or legal basis. Should the court be troubled by this question, however, a remand to permit the parties to develop an adequate record on this issue is the only appropriate remedy, as the Solicitor General has suggested. U.S. Brief in Support of Petition for Certiorari, 5, 11; U.S. Brief, 16.

3. Even if the negative implications of the Commerce Clause are found applicable to this special case, they provide no basis for a reversal of the court of appeals' judgment. As this Court has consistently recognized, the implied limitations that the Commerce Clause imposes on state legislation involve a delicate balancing of state and national interests. Beyond the traditional conflict between a state's interest in sustaining its local economy and the national interest in the free flow of commerce, there is in this case an additional and dispositive factor – a distinct federal policy favoring the particular state action under consideration. Even if that policy has not been declared with sufficient explicitness to remove the case altogether from the negative restraints of the Commerce Clause, it is nonetheless of such substantial weight to sharply tilt the Commerce Clause balance in favor of the challenged state action in order to effectuate national policy.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY CONCLUDED THAT CONGRESS HAS ENDORSED ALASKA'S IN-STATE PRIMARY MANUFACTURING REQUIREMENT AND THEREBY REMOVED IT FROM THE NEGATIVE IMPLICATIONS OF THE COMMERCE CLAUSE.

A. Congressional Timber Policy Affirmatively Sanctions Alaska's In-State Primary Manufacturing Requirement.

Throughout the federal government's long and intimate involvement with timber policy in Alaska, one theme predominates: the desire to develop and sustain Alaska's local wood processing industry. That policy was first articulated in the Secretary of Agriculture's 1928 decision to limit the export of unprocessed logs from the Territory. It has continued uninterrupted to the present day in regulations that limit the export of unprocessed logs from the state:

> Unprocessed timber from National Forest System Lands in Alaska may not be exported from the United States or shipped to other states without prior approval of the Regional Forester. This requirement is necessary to ensure the development and continued existence of adequate wood processing capacity in that state for the sustained utilization of timber from National Forests which are geographically isolated from other processing facilities.

36 C.F.R. § 223.10(c) (1982).

The current regulations reflect three long standing features of congressional timber policy toward Alaska that evidence approval of the state's virtually identical policy.

First, federal timber export law and policy has since 1928 treated Alaska differently. Alaska was especially singled out for perpetual export ban treatment in 1928, when federal policy forbidding the export of unprocessed logs from Alaska national forest lands was initially put in place. J.A. 105a. That policy was applied to Alaska *alone* for the next 40 years. In 1968, when Congress became concerned over exports to foreign ports from states other than Alaska, Alaska was

temporarily included within the scope of a near complete ban on foreign exports of unprocessed logs from all federal lands in the west (the Morse Amendment), with Congress only allowing a maximum export of 350 million board feet of unprocessed timber. Yet even that restraint was administered in accordance with federal policy barring export of unprocessed logs from Alaska, because the entire 350 million board feet export allowance was allocated to other states. J.A. 105a. Subsequently, a complete ban on foreign exports of unprocessed logs from the west was substituted for the Morse Amendment through appropriation riders starting in 1973. Alaska was excluded from the scope of that ban and instead was thereafter governed by the cited regulations, which were designed specifically for Alaska and which barred shipment of unprocessed Alaska logs *to other states* as well as to foreign countries. J.A. 98a. In short, in suggesting that its own in-state manufacturing requirement has been affirmed by Congress, Alaska simply relies on a specific Alaska-based policy that the federal government has followed for over a half-century.

Second, the federal government has not only singled out Alaska for unique treatment under federal timber laws, it also has carefully shaped its treatment in order to confront atypical problems the state faces in developing a timber processing industry. The current regulations plainly reveal the federal purpose: "to ensure the development and continued existence of adequate wood processing capacity in [Alaska] for the sustained utilization of timber from the National Forests which are geographically isolated from other processing facilities." 36 C.F.R. § 223.10(c) (1982). The federal primary manufacturing requirement is thus rooted in a desire to assure the vitality of the geographically isolated *local* wood processing industry. The governing regulations effectuate this end by banning both foreign *and interstate* shipment of unprocessed timber, by embracing all timber within the ban, and by limiting any potential exceptions to five very specific situations. *Id.*; J.A. 105a.

The State of Alaska's own timber policy, under attack here, has responded to the obviously identical factual

situation in nearly the identical way. Its policy is also designed to develop and sustain the capacity of the Alaska wood processing industry. J.A. 30a-32a, 52a. The policy does so by requiring purchasers of state owned timber to initially process it in-state before exporting it to whatever destination they choose. *See* Alaska Stat. § 38.05.115 (1976) and Alaska Admin. Code tit. 11, § 71.230 (1982), reprinted at Pet. App. 19a-21a. The Alaska primary manufacture requirement applies to the same markets, embraces the same timber, and allows for the same exceptions as do the federal regulations for federal land. To resist the court of appeals' conclusion that Congress has approved Alaska's policy, which is directed at the same federal objective, reinforces the identical federal policy, and tracks federal implementing rules, defies both congressional intent and common sense.

Third, South-Central and the Solicitor General can avoid the clear expression of congressional policy sanctioning Alaska's in-state manufacturing requirement only by focusing largely on federal timber policy towards land in states *other* than Alaska, paying no heed to the federal government's finely tuned Alaska policy. Brief, 27-32; U.S. Brief, 12-13. However, the provision of the current regulations that unprocessed timber may not be exported from Alaska "or shipped to other states" without prior approval of the Regional Forester, 36 C.F.R. § 223.10(c) (1982), furnishes further proof that Congressional intent is unmistakable: it is the *Alaska* wood processing industry in particular, not the domestic wood processing industry in general, that has continuously been the object of federal concern.[15]

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15. Moreover, Congress expressly intended to give the new state sufficient latitude to make use of its newly acquired timber resources to *complement* federal policy and generate Alaska timber processing industries:

> It is impossible for Congress to understand and solve the local problems of this distant area as well or as fast as they could be solved by state government. The rigidity of Territorial government and the inherent difficulties of acquiring Federal legislation are clearly restricting development of this vast area.

S. Rep. No. 1163, 85th Cong., 1st Sess. 9 (1957) (accompanying S.49, the Senate bill to admit Alaska into the Union).

By contrast, when dealing with states other than Alaska, Congress and responsible federal agencies have, at least in recent years, evinced a concern *not* with the development of a wood processing industry in a particular state, but rather with the provision of timber supplies for all the states viewed *collectively*. Thus, the Morse Amendment and the more recent appropriation riders applicable to states other than Alaska have banned only *foreign* export of unprocessed logs, without providing protection to either the timber supply or industry of any particular state. The implementing federal regulations likewise ban export of unprocessed timber only to *foreign* ports, and do nothing to protect one state's timber supply from the needs of another. 36 C.F.R. § 223.10(b) (1982); 43 C.F.R. § 5400.0-3(c) (1982). It is only with respect to Alaska that one can demonstrate historically that federal policy has reflected an explicit concern with the protection of Alaska's timber processing industry.[16]

Over the years, Congress has consistently recognized and approved the continuing policy of requiring in-state manufacturing for Alaska timber for the express purpose of supporting the state's wood processing industry. In 1969, after holding extensive hearings on the problem of timber

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16. The specific focus of federal policy on the development of the Alaska timber processing industry also should dispel any fear that an affirmance of the court of appeals' decision in this case would have significant precedential value for other states' primary manufacturing requirements, since federal timber policy for timber lands in Alaska is distinctly different from federal policy pertaining to federal timber land in other states. Moreover, other states' in-state manufacturing requirements do not bear nearly the resemblance that Alaska's does to any alleged federal counterpart. For instance, Idaho requires in-state primary manufacture for timber destined for both foreign and domestic markets, while the federal regulations governing timber land in Idaho require in-state processing prior to foreign export only. *Cf.* Idaho Code § 58-403 (1974) with 36 C.F.R. § 223.10(b) (1982), reprinted at Pet. App. 37a. Unlike the corresponding federal regulation, statutes in California, Idaho, and Oregon all require primary manufacture for all state timber without exception for domestic surplus. *See id.*; Cal. Pub. Res. Code § 4650.1 (West Supp. 1982); Or. Rev. Stat. § 526.805 (1981), all reprinted at Pet. App. 36a-38a.

shortages, a Senate subcommittee issued a lengthy report which not only endorsed the recently enacted Morse Amendment, but also went on to note that Alaska was "a special case":

> The development of Alaska, of course, has been inherent in some of the policies that have kept Alaska logs in Alaska. The special case nature of Alaska is evident in the statement of Edward P. Cliff, Chief of the Forest Service, at the hearings .... In testifying before the Select Committee on Small Business of the Senate last year Mr. Cliff made a statement on Alaska that was repeated in the report of that Committee which sheds considerable light on the Alaska situation. In commenting on the policy since 1928 of requiring timber cut from the national forests of Alaska to be given primary manufacture in Alaska, he stated:
>
> > This policy recognizes that the manufacture of Alaskan timber in Alaska rather than its shipment in the raw state for manufacture elsewhere is for the best interests of Alaska. This policy has resulted in the establishment of two major pulpmills and other wood-using plants. We are fostering plans for further installations. We believe that the policy must be continued to help develop Alaska.

Effect of Lumber Prices and Shortages on the Nation's Housing Goals, S. Doc. No. 27, 91st Cong., 1st Sess. 55-56 (1969). *See also, Shortages and Rising Prices of Softwood Lumber: Hearings Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs*, 93rd Cong., 1st Sess. 562-64 (1973) (Remarks of Alaska Senators Gravel and Stevens concerning in-state primary manufacturing laws used by the state and federal government). More recently, a Senate Report accompanying the Alaska National Interest Lands legislation observed: "Forest Service Policy for the Tongass ... has always required local primary manufacturing for the

purpose of adding growth and stabilization to the local economy." S. Rep. 413, 96th Cong., 1st Sess. 225 (1979).[17]

South-Central and the Solicitor General find comfort in the fact that Congress exempted Alaska from 1979 legislation curbing exports of unprocessed red cedar from state owned as well as federally owned lands, drawing the inference that Congress therefore *favored* the export of unprocessed logs from state owned lands in Alaska. *See* Export Administration Act of 1979, 50 U.S.C. app.§ 2406(i) (1979). In fact, the legislative history of the western red cedar exemption demonstrates Congress' continuing recognition and approval of Alaska's in-state primary manufacturing laws. Congress exempted Alaska from the export ban *only* because Alaska had no *processing* capacity for western red cedar. As the House Conference Report accompanying the red cedar restrictions indicates:

> The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate which provides an exemption to the State of Alaska

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17. Senators Metzenbaum and Tsongass expressed these additional views (*id.* in text at 401):

> The more immediate threat to sawmilling jobs comes from attempts by the existing industry to gain exemptions from the ban on round log exports. Just as the Native corporations can make these higher profits exporting raw materials, so can these corporations. However, the "primary manufacture law" requires local processing of public timber to provide jobs for the local economy. Timber from the National Forests cannot be exported without processing–in the case of Alaska, this includes "exporting" timber to the lower 48 states. Louisiana-Pacific wants to supply a mill it owns in Tacoma, Washington with timber from its 50-year contract area in Alaska, and is asking for an exemption from the export ban. This would allow it to supply the mill in Tacoma with cheap Tongass timber, rather than having to compete in the more expensive Northwest timber market.
>
> The Tacoma mill now uses Alaskan cants. ***Shipping round logs instead is quite simply exporting Alaskan jobs.*** The 50-year contracts and primary manufacture laws were designed to provide jobs in Alaska, not to provide cheap publicly subsidized timber to the Pacific Northwest. (Emphasis in the original.)

from application of certain provisions of the Export Administration Act of 1979.

It is the intent of the managers to continue to encourage the Forest Service to restrict administratively the export of unprocessed red cedar logs from Alaska *as soon as the capability develops to process such logs in Alaska.* (Emphasis supplied.)

H.R. Rep. No. 604, 96th Cong., lst Sess. 40 (1979). *See also*, S. Rep. No. 163, 96th Cong., 1st Sess. 110 (1979).

Furthermore, the Solicitor General is plainly wrong in asserting that "neither Congress nor the Secretary of Agriculture has manifested any separate concern with enhancing local employment opportunities" in Alaska. U.S. Brief, 12. When in 1951 the U.S. Forest Service signed the first 50 year timber contract with Ketchikan Pulp and Paper Co. for the Tongass National Forest, it required by contract that the company recruit its labor for logging, milling, and manufacturing operations from residents of southeastern Alaska so far as practicable. *Alaska's Vanishing Frontier – A Progress Report*, Report by William H. Hackett to Subcommittee on Territories and Insular Possessions of the House Committee on Interior and Insular Affairs, 52nd Cong., 1st Sess. 8 (Committee Print 1951). Also, the legislative history of the Statehood Act shows that Congress has long been concerned with the unique problems confronting Alaska's isolated economy, and accordingly federal in-state timber processing policies have been designed "to insure or promote a broad economic base in the form of manufacturing industry," *Kerr Study*, CR. 4, Ex. 11, at 41, consistent with the Executive Branch policy for Alaska

enunciated for the last half-century. *See* H.R. Doc. No. 485 and S. Doc. No. 120, *supra* n.2.

The court of appeals found that "the state's primary manufacture requirements duplicate those imposed on federal timber and service the same objective, that of promoting industrial developments in isolated areas." 693 F.2d 893; J.A. 143a. It carefully pointed out that "[t]he decision of Alaska's Commissioner of Natural Resources to condition the sale at Icy Cape on primary manufacture was made in the wake of a temporary suspension of federal timber sales from the Tongass and Chugach National Forests." *Id.* The court further observed that "[i]ts purpose was to protect local processors from the resulting slack in demand for their services." *Id.* The court therefore concluded that "[t]he state's decision could not have been more in keeping with federal timber policy." *Id.* Given the abundant evidence of congressional support for Alaska's in-state primary manufacturing requirement, the court of appeals' decision reversing the district court is unassailable.

B. Congress Has Expressed Approval of Alaska's In-State Primary Manufacturing Requirement With Sufficient Explicitness to Remove It From the Negative Implications of the Commerce Clause.

Having determined that congressional policy sanctioned Alaska's primary manufacturing requirement, the court of appeals properly concluded that such congressional approval insulated the requirement from attack under the negative implications of the Commerce Clause. The court noted that this principle is often applied in cases involving express congressional authorization but that "express authorization is not always necessary." 693 F.2d 893; J.A. 142a. "There will be instances," the court continued, "like the case before us, where federal policy is so clearly delineated that a state may enact a parallel policy without explicit congressional approval, even if the purpose and effect of the state law is to favor local interests." *Id.*

The court of appeals' holding is solidly grounded in sound constitutional policy. It is undisputed that Congress

possesses plenary power to sanction state laws and thereby remove them from the negative implications of the Commerce Clause. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945). In this case, the history of federal timber policy toward Alaska shows that Congress has sanctioned Alaska's primary manufacturing requirement, thus definitively validating the requirement for Commerce Clause purposes.

Relying upon cases in which this Court has found express, statutory congressional authorization of state laws that were challenged under the Commerce Clause, South-Central and the Solicitor General urge the Court to adopt an inflexible rule of literal consent to govern the instant case. Such a rule, however, would disserve its underlying rationale and is unwarranted by this Court's precedents.

The doctrine that congressional consent to state action removes the action from judicial scrutiny under the negative implications of the Commerce Clause recognizes Congress' primacy with respect to the allocation of power over interstate commerce. *See Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946). When Congress has indicated its approval of state action, courts are deprived of power to second guess the congressional judgment. There is nothing in that principle, however, that requires Congress to display its intentions in any particular form. Indeed, it is Congress' prerogative – not the courts' – to make its policies known in the manner that it sees fit. Whatever way a court might resolve a dispute under the malleable principles of Commerce Clause analysis, once Congress has entered the picture in an affirmative manner, the judicial inquiry is at an end.

The unbending rule of literal consent that South-Central and the Solicitor General espouse flies in the face of the plenary congressional power over commerce on which the rule itself is predicated. It arrogates to the judiciary what is patently a legislative function – determining the ultimate allocation of such power. It is not within the province of judicial power to dictate to Congress the precise manner in which congressional will must be expressed. Nor can a court

ignore that expression of will if it does not comport with a wooden rule of literal consent.

The application of such a wooden rule to the special case here demonstrates its lack of wisdom. Despite a half-century policy supporting a primary manufacturing policy for Alaska timber, South-Central and the Solicitor General would have the Court disregard this policy because Congress has not taken the opportunity to enact legislation that literally and explicitly declares its consent. The result would be to frustrate congressional intent, and would "ignore[ ] the obvious role played by the regulatory agencies in translating the general into the particular and thus fleshing out the commands of Congress." J. Eule, *Laying The Dormant Commerce Clause To Rest*, 91 Yale L.J. 425, 435 (1982). Moreover, it would saddle Congress, whose enormous legislative agenda plainly precludes it from specifically identifying and addressing literally every state law or policy it believes is consonant with federal policy, with a burden the Constitution did not place upon it.

Clearly, the Court's precedents do not establish an inflexible rule of literal consent as a litmus paper test for ascertaining congressional approval of state laws. The Court's opinion just last Term in *White v. Massachusetts Council of Construction Employers, Inc.*, 103 S.Ct. 1042 (1983), makes this plain. In *White*, the Court considered a Commerce Clause challenge to the Boston mayor's executive order requiring that all construction projects funded in whole or in part by city funds be performed by a work force at least half of which were Boston residents. With respect to projects financed in part by federal funds, the Court addressed the question whether federal approval of the local policy obviated any inquiry into the dormant Commerce Clause issue. Examining the pertinent federal statutes and regulations, which, like those applicable to this case, were designed to encourage local industrial development and employment opportunities, the Court concluded that the local executive order was consistent with federal policy and thus immune from Commerce Clause attack. Significantly, the Court

couched its analysis in terms of whether the federal *regulations* "affirmatively permit" (id. at 1047), "affirmatively sanctio[n]" (*id.* at 1048), or "soun[d] a harmonious note" (*id.* at 1047) with the executive order. It did not exalt literal statutory approval into a talisman of congressional consent analysis, as it could not without thwarting the obvious intent of the federal regulations. There is no reason for abandoning that approach in this case, in which the history of analogous federal regulations unmistakably evidences congressional sanction and permits the state action in question.[18]

Finally, however appropriate a rule of literal consent might be with respect to broad based state regulation of the private sector, when the state enters the private sector as a mere participant in the market—as Alaska did in selling its timber—the considerations favoring a wooden rule of literal consent are even weaker. Because the state's impact on the market as a mere participant in it will ordinarily be less than its regulation of it, the necessity for explicit congressional approval of the state's action as a safeguard

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18. South-Central and the Solicitor General rely on three recent cases in which this Court failed to find a sufficient indication of congressional assent to a state law to remove it from the negative implications of the Commerce Clause: *Sporhase v. Nebraska*, 102 S.Ct. 3456 (1982), *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), and *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27 (1980). Brief, 22-26; U.S. Brief, 9-10. In none of these cases, however, was there a specific policy equivalent to the federal government's policy favoring the development of a particular industry in a particular state that is at issue here. Thus, in *Sporhase* the Court refused to infer congressional approval of Nebraska's restriction on the export of ground water from a welter of federal statutes generally indicating congressional deference to state water law but providing no indication of support for Nebraska's particular policy. 102 S.Ct. at 3465-66. In *New England Power*, the Court likewise failed to find in a general savings clause permitting the states to continue to exercise power they lawfully possessed over the exportation of hydroelectric power as sanctioning a prohibition on the export of such power. 455 U.S. at 340-43. And in *Lewis*, the Court found no support in provisions of the Bank Holding Company Act bearing generally on the scope of state power for the specific restriction that Florida had imposed on out-of-state banks. 447 U.S. at 44-49.

against unwarranted interference with the market is correspondingly diminished. Furthermore, respect for state autonomy when it enters the market as a private trader, *see Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980), militates against a rule that would fail to respect that automony in every case in which Congress had failed to consent explicitly to the state action in question.

II. THE NEGATIVE IMPLICATIONS OF THE COMMERCE CLAUSE DO NOT LIMIT A STATE'S CHOICE OF THE TERMS ON WHICH IT CHOOSES TO DISPOSE OF ITS OWN RESOURCES.

A. Alaska's In-State Primary Manufacturing Requirement Is Invulnerable To Commerce Clause Challenge Under The Court's Decisions In *Alexandria Scrap*, *Reeves*, and *White*.

Even if the Court were to find that Congress had not been sufficiently explicit in its approval of Alaska's primary manufacturing requirement to remove it from judicial scrutiny under the negative implications of the Commerce Clause, the requirement is free from such scrutiny for another, independent reason. When a state acts as a participant in the market rather than as a regulator of it, the Commerce Clause does not restrain the state's action. *White v. Massachusetts Council of Construction Employers, Inc.*, 103 S.Ct. 1042 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). Alaska's specification of the contractual terms on which it chooses to dispose of its own timber falls squarely within the holdings and reasoning of the Court's decisions establishing that this is not "the kind of action with which the Commerce Clause is concerned." *Id.* at 805.

In *Alexandria Scrap*, the Court sustained over Commerce Clause objections a Maryland statute designed to encourage the destruction of abandoned automobiles through payments of cash bounties to scrap processors. Even though the scheme favored local interests by imposing more burdensome documentation requirements on out-of-state than on in-state processors, the Court upheld it. The Court distinguished

cases involving burdensome state regulations of interstate commerce from the case before it in which Maryland had "entered into the market itself", 426 U.S. at 806, "as a purchaser, in effect, of a potential article of interstate commerce." *Id.* at 808. The Court concluded that "[n]othing in the purposes animating the Commerce Clause prohibits a State ... from participating in the market and exercising the right to favor its citizens over others." *Id.* at 810.

This case bears a striking resemblance to *Alexandria Scrap*. Alaska, like Maryland, has participated in the market itself and has not sought to regulate the market generally. Alaska's entry into the market has inured to the benefit of its local wood processing industry just as Maryland's entry into the market inured to the benefit of its local scrap processing industry. Finally, and most significantly, Alaska's entry into the market may be viewed as precisely the same type of subsidy to local interests that the Court found unobjectionable in *Alexandria Scrap*.

When Alaska requires that purchasers of its timber process it in-state, it subsidizes local timber processing. The amount of the subsidy is roughly equal to the difference between the price the timber would fetch in the absence of such a requirement and the amount the state actually receives, an amount that may be substantial, as the facts surrounding the 1978 waiver of the primary manufacturing requirement for Icy Cape No. 1 show. *See Kenai Lumber Co., Inc. v. LeResche*, 646 P.2d 215, 216-217 (Alaska 1982). Nothing in the Commerce Clause inhibits the state's "power to experiment with different methods of encouraging local industry. Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not characterized as a 'burden' on commerce." *Alexandria Scrap*, 426 U.S. at 816. (Stevens, J., concurring). Alaska has done no more than choose to receive part of its consideration for its timber in

the form of a commitment to develop local industry rather than in cash.[19]

The Court's decision in *Reeves* made it clear that the Commerce Clause imposes no limitation on Alaska's power to choose the terms on which it will sell its timber. In *Reeves*, the Court held that the Commerce Clause had no application to South Dakota's policy of supplying all South Dakota customers first when it sold cement from a state owned cement plant. The Court reaffirmed that "[t]he basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law." 447 U.S. at 436. The Court observed that "[r]estraint in this area is also counseled by considerations of state sovereignty, the role of each state "'as guardian and trustee for its people,'" and "'the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'" *Id.* at 438-39 (citations and footnotes omitted). Finally, the Court noted that

> the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors, *Alexandria Scrap* wisely recognizes that, as a rule, the adjustment of interests in this context is a task better suited for Congress than this Court.

Id.

The concerns motivating the Court's decision in *Reeves* similarly counsel judicial restraint here. First, it is plain that

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19. The state does not monopolize the source of timber either, leaving purchasers the option to buy timber from other sellers in Alaska who will sell without processing requirements. In 1980, two-thirds of Alaska's exports were attributable to round log sales from privately held Native lands in southeastern Alaska. *Prohibit Export of Unprocessed Timber: Hearings Before the Subcommittee on Forest, Family Farms and Energy of the House Committee on Agriculture*, 97th Cong., 1st Sess. 7 (1981). See also Pacific Rim Amici Curiae Brief, 7, asserting private lands account for 70% of all round log exports from Oregon, Idaho, California, and Alaska.

Alaska, like South Dakota, is acting as a participant in the market and not as a regulator of it. Alaska has entered the market to sell its timber just as South Dakota entered the market to sell its cement. Alaska has specified the terms and conditions on which it will sell its timber, including the requirement that purchasers initially process it in-state, just as South Dakota specified the terms and conditions on which it would sell its cement, although South Dakota went further and preferred purchasers who were residents of the state. While in *Reeves* South Dakota's action cut off the complaining purchaser from its principal source of supply for 20 years, forcing 76% production cuts, Alaska sought to do just the opposite by entering the market to *add* to the supply so purchasers could *increase* production and survive. *See id.* 447 U.S. at 432-33.

Second, it is apparent that Alaska's sovereign interest in developing its local timber industry by providing its processors with a supply of timber is no less worthy of constitutional protection than South Dakota's sovereign interest in providing its residents with a supply of cement. "Such policies, while perhaps 'protectionist' in a loose sense, reflect the essential and patently unobjectionable purpose of state government–to serve the citizens of the State." *Id.* at 442.

Third, when the state enters the market to buy or sell, its actions are ordinarily subject to the constraints of the antitrust laws and other federal restraints on private market conduct. *See, e.g., Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories*, 103 S.Ct. 1011 (1983). It is only fair, as the Court pointed out in *Reeves*, "that when acting as proprietors, States should similarly share [with private market participants] existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." 447 U.S. at 438. This principle of evenhandedness suggests that the states should not be whipsawed between the antitrust laws and the negative restraints of the Commerce Clause when they enter the market to buy or sell.

Finally, the competing considerations in this case are at least as "subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis," *id.* at 439, as those that have induced the Court in analogous circumstances to leave the adjustment of interests to Congress. Alaska's geographical isolation, its virtually nonexistent economic infrastructure, its chronic unemployment,[20] and the unusually large role that the state government must inevitably shoulder in furthering the development of its private sector are just a few of the factors that must be taken into account in making such an adjustment. Furthermore, the long standing federal concern and involvement with Alaska's forest industry development make judicial intrusion into these matters particularly inappropriate.

The Court's recent decision in *White* lends further support to the conclusion that Alaska's primary manufacturing requirement does not implicate the Commerce Clause. In *White*, the Court held that the City of Boston was acting as a market participant, not subject to Commerce Clause restrictions, when it required that all construction projects be performed by a work force consisting of at least half Boston residents. The Court rejected the argument that the Boston local hire requirement violated the Commerce Clause because it reached beyond the immediate parties employed by the city and regulated contracts between public contractors and their subcontractors. The Court declared that the "Commerce Clause does not require the city to stop

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20. In 1980, Alaska's unemployment rate was 9.4%, behind only Michigan's 12.6%, and Indiana's 9.6%, and over two percentage points higher than the national average of 7.1%. U.S. Bureau of Census, *Statistical Abstract of the United States: 1981* (102d ed.), 392-93. By comparison, Japan, with some 20,000 timber mills, Pacific Rim Amici Curiae Brief, 5, and the destination of most Alaska timber exports, had a 2.0% unemployment rate in 1980. *Statistical Abstract* at 882.

According to *Public Timber Export Control: Hearings Before The Subcommittee On Public Lands Of The Committee On Interior and Insular Affairs, House Of Representatives, On H.R. 5544 And 6820*, 94th Cong., 1st Sess. 31 (1975), domestic processing creates two additional jobs to every job involved in log exporting. *See also Kerr Study*, CR. 4, Ex. 11, at 33.

at the boundary of formal privity of contract," 103 S.Ct. at 1046 n.7, and found the restraint acceptable because it covered "a discrete, identifiable class of economic activity in which the city is a major participant." *Id.*

After *White*, Alaska's primary manufacturing requirement is, *a fortiori*, invulnerable to Commerce Clause challenge. Alaska's role in this case is that of a seller of timber, pure and simple. In offering state owned timber for sale on the condition that the purchaser perform primary manufacture in the state, Alaska is not regulating contracts for the resale of timber or regulating the buying and selling of privately owned timber. Alaska's requirement also "covers a discrete, identifiable class of economic activity in which the [state] is a major participant," – to wit, the sales of its own timber. *Id.* And, Alaska's primary manufacture requirement stops at the boundary of formal privity of contract. Its contractual requirement applies only to the immediate purchaser of its timber – requiring such purchaser to initially process the timber in-state. *Cf. White.*

B. The Fact That This Case Involves A Natural Resource Does Not Remove It From The Market Participant Doctrine.

Both South-Central and the Solicitor General argue that the freedom from Commerce Clause restraints that the states enjoy when they act as market participants is inapplicable to this case because it involves a natural resource. Brief, 36-37; U.S. Brief, 21. They seize on language in the Court's opinion in *Reeves* which noted that the case involved cement, a man-made resource, 447 U.S. at 443-444, and then suggest that the Court intended to limit the market participant rule only to man-made resources. Such an inference is wholly unwarranted for a number of reasons.

First, the purported predicate for the distinction, that natural resources are adventitiously distributed and, unlike man-made resources, involve no investment, foresight, or risk by the state is unfounded – at least in this case. Alaska's concern with and planning for the management, growth, and protection of its forest resources in terms of time, energy,

and tax dollars dwarfs any comparable investment that South Dakota could conceivably have made in a single cement plant. In 1980, Alaska spent over $4,690,700 for forest management, forest fire protection, forestry research and related purposes, excluding the special appropriation for Icy Cape No. 2.[21] In 1981, 1982, and 1983, the equivalent figures were over $7,607,000, $7,995,000 and $9,667,000.[22] In short, any effort to distinguish man-made from natural resources on the ground that they do not involve a substantial investment by the state is, at least on the facts of this case, a spurious one.

Second, there is no basis in sound constitutional analysis for distinguishing natural resources from other resources owned by the state.[23] If the state's freedom from Commerce Clause restraint in disposing of state owned property depends on the extent of the state taxpayers' investment in the property, then the appropriate rule would be one that looked to the extent of that investment in applying it. The state may acquire natural resources through gift or grant, exchange or purchase, eminent domain or escheat; it may spend considerable sums in managing such resources; and, in the case of timber or farm products, it may create the resources by planting and cultivating them. It would be an odd rule of constitutional law that denied the state's freedom to dispose of such resources as it wished yet permitted the

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21. 1980 Alaska Sess. Laws, ch. 120, § 51, at 39, lines 5-9; ch. 6, § 1, at 3; and ch. 50 § 145.

22. 1981 Alaska Sess. Laws, ch. 82, § 28, at 54-55, lines 26, 4-7; 1982 Alaska Sess. Laws, ch. 101, § 79, at 45, lines 14-17; 1983 Alaska Sess. Laws, ch. 107, § 32, at 31, lines 5-8.

23. South-Central confuses matters by relying on Commerce Clause cases where this Court dealt with "state attempts to regulate natural resources which the state owns" only in the sense it has a regulatory interest in them, but does not "own" in the conventional sense of the word. *See Hughes v. Oklahoma*, 441 U.S. 322, 327-36, 341 (1979). One can easily distinguish as well any case South-Central cites in which the challenged state action had reached beyond state owned goods to regulate privately owned goods.

state to discriminate freely with respect to a manufacturing facility gratuitously conveyed to it by some benefactor.

Finally, considerations of state sovereignty suggest that natural resources should be treated no differently from other state owned property for Commerce Clause purposes:

> To preclude the States from preferring in-state interests in the distribution of state natural resources would deprive the States of an important attribute of their separate existence as independent political units in the federal system. The denial to the States of the power to provide for their residents as such would undermine the relationship between the States and their residents. Moreover, forbidding the States from preferring their own in the distribution of their resources would introduce into the federal system an unsettling asymmetry between the respective obligations the resident and nonresident owe to the State and the benefits they enjoy there. Whether it would be good national policy to deny the States the power to favor in-state interests in this context and whether Congress in pursuit of such policy could legislate to that end are, of course, different questions. The only question here is whether the Commerce Clause by its own force withdraws this power from the States. While the Commerce Clause may have been designed to create a national common market, it would take more than a "great silence" to sever the special relationship between a State and its in-state residents and businesses.

W. Hellerstein, *Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources*, 1979 Sup. Ct. Rev. 51, 77-78.

C. Alaska's In-State Primary Manufacturing Requirement Does Not Impermissibly Reach Beyond The Immediate Parties With Which The State Transacts Business.

Both South-Central and the Solicitor General contend that Alaska's in-state primary manufacturing requirement impermissibly reaches beyond the immediate parties with whom the state is dealing and thereby makes the state a regulator of, rather than a participant in, the market. Brief, 37-38; U.S. Brief, 20-21. The contention cannot be squared with either the Court's decision in *White* or the facts of this

case. The Court made it clear in *White* that *even if* a state's conditioning of the disposition of its resources extended beyond the immediate parties, it would not necessarily deprive the state of its Commerce Clause immunity. 103 S.Ct. at 1046. The only question was whether the state action "covers a discrete, identifiable class of economic activity in which the city is a major participant." *Id.* Alaska's primary manufacturing requirement plainly covers such an identifiable class of activity -- sales of its own timber.

It is true that the Court in *White* went on to note that "[e]veryone affected by the order is, in a substantial if informal sense, 'working for the city.'" *Id.* at 1046 n.7. The Solicitor General, attempting to distinguish *White*, claims that "timber processors cannot be characterized, even in an informal sense, as, 'working' for the State." U.S. Brief, 20. The claim falters on two counts. First, it is clear that the Court in *White* referred to the city's role as an indirect employer of those affected by the order as an illustration of the type of "participation" in a "discrete class of economic activity" that would preserve the city's Commerce Clause immunity. Alaska's requirement applies to a different but no less discrete class of economic activity in which it is a major participant. Second, Alaska's requirement does not apply to timber processors. It applies only to purchasers who, as a condition of the purchase, agree to have the timber processed in-state. The indirect effect, if any, on "downstream" operations is certainly no more substantial than the direct "downstream" impact in *White*.[24]

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24. South-Central claims Alaska is attempting to ban export of a product it no longer owns because title passes when the timber is "paid for, cut and scaled." Brief, 41 and n.3. The record, however, is bare of evidence that payment would be made and title would pass before primary manufacturing would occur for a group of logs. *See* Contract §§ 11, 12, 49 at J.A. 64a, 79a. In any event, passage of title is subject to the primary manufacturing requirement by regulation as well as by contract. Alaska Admin. Code tit. 11 § 76.080 (amended 1982). This South-Central theory is self-defeating, since under it a state would only need hold "title" longer in order to fall within the market participant rule. Finally, the Court's interpretation of the Commerce Clause should not depend on the vagaries of contract law.

Finally, South-Central and the Solicitor General's claim of support in *Hicklin v. Orbeck*, 437 U.S. 518 (1978), Brief, 38-39, U.S. Brief, 21, is ironic, since it is a case at best illustrative of what this case is *not* about. In *Hicklin*, the Court struck down under the Privileges and Immunities Clause an Alaska statute requiring that residents be preferred over nonresidents with regard to "all employment which is a result of oil and gas leases, easements, leases or rights-of-way permits for oil and gas pipeline purposes ... to which the state is a party." Alaska Stat. § 38.40.050(a) (1977), *quoted at* 437 U.S. at 528. Emphasizing the virtually unlimited reach of the statute, extending to employers who have no connection whatsoever with the State's oil and gas, perform no work on State land, have no contractual relationship with the State, and receive no payment from the State," *id.* at 530, the Court concluded that Alaska's ownership of oil and gas was an "insufficient justification" (*id.* at 531) for forcing "virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources to bias their employment practices in favor of the State's residents." *Id.* The Court had no trouble distinguishing such a pervasive and all encompassing restriction from the more limited restraint at issue in *White*. *See White*, 103 S.Ct. at 1047. The Alaska hire law reached deeply into the private market, while, in contrast, Alaska's limited in-state manufacturing requirement applies only to state owned timber.[25]

D. Alaska's Primary Manufacturing Requirement Imposes No Special Burden On Commerce So As To Remove It From The Market Participant Doctrine.

South-Central and the Solicitor General raise a number of claims regarding the alleged burden that Alaska's primary manufacturing requirement has on commerce, and they rely

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25. It is worth noting that *Hicklin*, though rejecting the overly broad restraint Alaska had imposed on the basis of its ownership of oil and gas, made it clear that such ownership does permit the states to favor local interests in the disposition of their natural resources. 437 U.S. at 528-532. *See also* Hellerstein, *supra*, 1979 Sup. Ct. Rev. at 79.

upon these allegations as a basis for subjecting the requirement to Commerce Clause review. Brief, 40-43; U.S. Brief, 21-22.

First of all, it should be noted that South-Central, the Solicitor General, and Amici Curiae Pacific Rim all agree that since the Jones Act, 46 U.S.C. § 883 (Supp. V 1981), makes shipment of Alaska timber to the contiguous 48 states uneconomic, there is no interstate, as opposed to foreign, market for Alaska timber. Petition for Certorari Brief, 3 n.2; Brief, 14 n.14; U.S. Brief, 24; Pacific Rim Brief, 5 n.11. This is the same conclusion reached by a U.S. Senate Committee. Brief, 14 n.14. Since there is no interstate market, *a fortiori*, there can be no interstate burden, explaining the sudden South-Central briefing of "foreign" commerce on *certiorari*.

Second, South-Central's claim that the market participant rule is inapplicable because the primary economic impact of Alaska's primary manufacturing requirement falls on out-of-state consumers, Brief, 40, is irrelevant and is not supported by the facts. As the Court pointed out in *White*, "impact on out-of-state residents figures in the equation only after it is decided that the city is regulating the market rather than participating in it, for only in the former case need it be determined whether any burden on interstate commerce is permitted by the Commerce Clause." 103 S.Ct. at 1046. In any event, it is plain that any burden of Alaska's in-state manufacturing requirement is borne by Alaskans, not by out-of-state consumers. Alaska does not control the price of timber. If it wishes to insist on a primary manufacturing requirement which entails higher costs for the purchaser of its timber, it must reduce its price correspondingly, in effect paying for in-state processing. *Kerr Study*, CR. 4, Ex. 11, at 49. It is Alaska residents who forego an immediate increase in revenues the state would receive in the absence of such a requirement.

Third, the suggestion that the state has burdened the market rather than created a market by a state financed subsidy program is likewise untenable on its face. Brief, 42. The market for Alaska timber exists only because Alaska

has chosen to sell it. Alaska could eliminate the market tomorrow if it chose not to sell and could, of course, go into the business of processing timber in a state owned processing plant analogous to the state owned cement plant in *Reeves*, giving preference in hiring as in *White* to resident workers. The Commerce Clause was not meant to be used to penalize a state for taking the less drastic step of inducing the private sector to aid its industrial development, or for supplying resources to assist a floundering industry.

Fourth, South-Central and the Solicitor General's argument that Alaska's primary manufacturing requirement imposes a burden on foreign commerce and that this somehow makes the market participant doctrine inapplicable is unwarranted in theory, lacks any foundation in the record, and is newly raised in this Court. At the outset, the assertion that the Commerce Clause applies to a state's participation in the foreign but not the domestic market cannot be reconciled with the underlying justification for the market participant rule. The state is immune from Commerce Clause scrutiny because it is acting substantially like any other trader and is not engaging in the governmental regulations to which the Clause has traditionally been applied. Such a fundamental distinction may not be ignored merely because the state may be selling to a foreign purchaser or buying from a foreign seller. As the Court noted in *White*, the question of burden comes into play only *after* it is determined that the state is acting as a market regulator rather than a market participant. 103 S.Ct. at 1046. There is nothing in that observation which differentiates foreign from domestic burdens.

Furthermore, there is no evidence in the record that foreign commerce is in any way burdened by Alaska's primary manufacturing requirement. There is no evidence of record that Japanese consumers, the principal market target for Alaska timber purchasers, rejected Icy Cape No. 1 timber processed in Alaska, or otherwise will not purchase processed timber. There is, therefore, no warrant for the allegation that Alaska's primary manufacturing burdens the flow of commerce abroad. Finally, although South-Central

briefly alluded to the phrase "foreign commerce" in the proceedings below, there was virtually no argument or briefing on the issue in either the district court or the court of appeals,[26] and neither court addressed the claim on the merits in its opinion. It is only in its Petition for Certiorari Brief, 16-19, that South-Central suddenly identified this issue, too late for creation of a record that allows for adequate judicial review. If the Court believes that this issue merits further consideration, the appropriate course would be to remand the case to the district court to allow the parties to develop an adequate record. This is the course that the Solicitor General has recommended. *See* Brief of United States in Support of Petition for Certiorari, 5, 11; U.S. Brief, 16.

III. EVEN IF ALASKA'S IN-STATE MANUFACTURING REQUIREMENT WERE SUBJECT TO SCRUTINY UNDER TRADITIONAL COMMERCE CLAUSE CRITERIA, IT WOULD NOT VIOLATE THOSE CRITERIA GIVEN THE STRONG INDICIA OF CONGRESSIONAL APPROVAL.

It is well settled that in delineating the implied limitations that the Commerce Clause imposes on state legislation, the Court is engaged in a delicate balancing of state and national interests. If this Court were to determine that Alaska's in-state manufacturing requirement were subject to the negative implications of the Commerce Clause, the Court would then have to balance the competing demands of national economic unity and legitimate state policy which that requirement might implicate. In recent years, the Court has consistently under-taken that task in light of the well known and often used formulation articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> Although the criteria for determining validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be

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26. The sole South-Central discussion of foreign commerce was in scant remarks in its summary judgment papers, CR. 51, at 13, quoted nearly verbatim in an equally perfunctory discussion in the court of appeals, *Appellee Brief*, at 28.

> phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, but more frequently it has spoken in terms of "direct" and "indirect" effects and burdens.

Alaska's primary manufacturing requirement is unobjectionable under these criteria.

First, Alaska's primary manufacturing requirement applies evenhandedly. It applies to all purchasers of state owned timber, regardless of their domestic, interstate, or foreign origin or connections and regardless of the ultimate destination of the timber.[27] Second, the requirement effectuates a legitimate national and local interest, the development of Alaska's timber processing industry. Third, whatever burden the requirement allegedly imposes on foreign commerce, it is of such insignificance that it may not warrant Commerce Clause scrutiny as an initial matter. The state, after all, is not a monopoly owner of timber but is only one seller in an Alaska timber market dominated by private firms. *See* n.19, *supra*. The terms of its contract with a particular purchaser hardly rise to the level of a "burden"

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27. According to the *Affidavit* of South-Central's operations manager Clyde Tanaka, at least three timber companies with milling capacity in Alaska were potential competitors at Icy Cape No. 2, Kenai Lumber Co., Inc., Schnable Lumber Co., and Alaska Lumber and Pulp Co. CR. 3, at 405. South-Central could have subcontracted milling to one of these. J.A. 8a. Kenai Lumber Co., Inc. is an Alaska corporation, and is a wholly owned subsidiary of Louisiana-Pacific Corp., a Delaware corporation with a headquarters office in Portland, Oregon. Standard & Poor's Corporation, *Standard Corporation Descriptions* (1983), 3564. Alaska Lumber and Pulp Co. was, in 1980 at least, a Japanese owned company. *Kerr Study*, CR. 4, Ex. 11, at 16-17.

on commerce, especially when there is no evidence in the record that the flow of commerce is affected by such a requirement. Indeed, it is a strange rule of law that would characterize as burdensome under the Commerce Clause commerce that the state itself has created to benefit those who paradoxically attack the state over the manner of the creation.

Any contention that Alaska's primary manufacturing requirement burdens commerce also runs counter to the Court's decision in *Exxon v. Governor of Maryland*, 437 U.S. 117 (1978). In *Exxon*, the Court sustained over Commerce Clause objection a Maryland statute that forbade producers or refiners of petroleum products from owning or operating retail gasoline stations in the state. Emphasizing the fact that Maryland statutes did not affect the flow of interstate goods, *id.* at 126, the Court declared that "[c]ommerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate [company] to another." *Id.* at 127; *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981). The same reasoning applies here. There is no evidence in the record that Alaska's primary manufacturing requirement decreases the flow of timber in commerce. The fact that it may favor integrated timber harvester-type manufacturers over timber harvesters without processing facilities in the state is of no more constitutional significance than the fact that Maryland's action favored nonintegrated gas retailers over retailers that were part of integrated firms. The Commerce Clause protects "the interstate market, not particular interstate firms". *Exxon*, 437 U.S. at 127. Moreover, the alleged burden on commerce in this case is in reality a self-inflicted wound. Because South-Central, once an integrated harvester-manufacturer, was unwilling to invest monies to maintain a mill operation consistent with Alaska pollution laws, *Kenai Lumber Co. v. LeResche*, 646 P.2d 215, 218-19 (1982), it suddenly discovered that Alaska's in-state manufacturing requirement, of which it was the beneficiary for years, posed a burden on commerce.

The legal and factual contentions that Alaska's primary manufacturing requirement burdens foreign commerce and

that, even if it survives scrutiny under the standards for interstate commerce, it cannot withstand the more rigorous standards of review applicable to foreign commerce, Brief, 14-22, U.S. Brief, 22-26, likewise lack merit.[28] There is simply no evidence in the record that Alaska's primary manufacturing requirement has affected the flow of commerce abroad at all. Whatever effect it might conceivably have – the sale by one small participant in a large international market – is of insufficient magnitude to constitute a burden for purposes of the foreign Commerce Clause. *Cf. Container Corp. of America v. Franchise Tax Board*, 103 S.Ct. 2933, 2955 (1983) (no foreign affairs implications in a state tax merely because it had "foreign resonances").

Furthermore, if, as South-Central and the Solicitor General contend, the additional concern implicated by the foreign Commerce Clause is that the United States must speak with "'one voice when regulating commercial relations with foreign governments,'" *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979), *quoting Michelin Tire Corp v. Wages*, 423 U.S. 276, 285 (1976), Brief, 16, U.S. Brief, 25, that concern is fully satisfied here. The current federal statutory policy towards timber on federal land west of the 100° moridian (excepting Alaska) is to ban the export of unprocessed timber entirely. 16 U.S.C. § 616 (1974) The current federal policy inside Alaska is to prohibit unprocessed timber exports. 36 C.F.R. § 223.10(c) (1982) (Department of Agriculture); *BLM Manual*, Re. 5-101, 5425, "Local Export Stipulation LE-1" (Aug. 4, 1975), App.1 (.21B5c) (Department of Interior). Hence, Alaska's primary

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28. The General Agreement on Tariff and Trade (GATT) and Trade Agreements Act of 1979 arguments are also newly identified by South-Central in this Court. Plainly, neither apply here. GATT negotiated standards requirements, consisting largely of precatory language binding only central governments, were implemented in the Trade Agreements Act of 1979, 19 U.S.C. § 2531 *et seq.* (Supp. V 1981). *See generally* Article, *Prospects for Implementation of the GATT Standards Agreement in the United States*, 20 Va. International Law 700, 704-711 (1980). The Act on its face does not apply to state agencies – absent Presidential action – and creates no private cause of action. 19 U.S.C. §§ 2533, 2504(d), 2501.

manufacturing requirement could not be more in harmony with the "one voice" doctrine.

Finally, and most significantly, the Court's Commerce Clause calculus – whether or not focusing on foreign commerce – must necessarily take account of the long standing federal policy towards Alaska which has approved its primary manufacturing requirement. Even if the Court should resolve the approval issue against the state, it is nevertheless apparent there is substantial evidence of implicit congressional sanction for Alaska's primary manufacturing requirement. When this federal policy is weighed in the Commerce Clause balance, as it must be, the balance tips decidedly in favor of the constitutionality of Alaska' policy.

The Court's decision in *Parker v. Brown*, 317 U.S. 341 (1943) illustrates the point. In *Parker*, the Court considered a Commerce Clause challenge to a California statute requiring raisin producers to deliver a portion of their crop to a state marketing control agency which was authorized to control marketing in order to enhance the price of raisins. In sustaining the state law the Court declared that

> [i]n comparing the relative weights of the conflicting local and national interests involved it is significant that Congress, by its agricultural legislation, has recognized the distressed condition of much of the agricultural production of the United States and *has authorized marketing procedures, substantially like the California Program for stabilizing the marketing of agricultural products.* (Emphasis supplied).

Id. at 367. The analogy between *Parker* and the instant case could not be closer. Just as California had imposed marketing requirements that tracked similar federal legislation, so Alaska has imposed a primary manufacturing requirement that tracks similar federal regulations. And just as the Court found the impact of federal policy a critical factor in accommodating the competing interests involved, so in this case the federal government's approval of Alaska's primary manufacturing requirement inexorably leads to the

conclusion that the requirement should be sustained under the Commerce Clause.

CONCLUSION

As there is ample support for the court of appeals' decision, this Court should affirm. Should the Court decide to the contrary, and further decide that Alaska's action is not immune from Commerce Clause scrutiny under the market participant rule, nonetheless the Court should still affirm since there is no evidence of any burden on commerce, and any hypothecated burden is heavily outweighed by substantial, shared federal and state interests. Should the Court be troubled by questions concerning foreign commerce which South-Central newly raises, a remand for factual development is the only appropriate remedy.

Respectfully submitted,

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December 29, 1983

APPENDIX

STATE OF ALASKA
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF FORESTRY

NOTICE OF TIMBER SALE

The State of Alaska, Division of Forestry, Southcentral District, pouch 7-005, Anchorage, Alaska, 99510, will sell, at oral auction, at 2:00 p.m. prevailing time on November 17, 1983, in the Frontier Building Conference Room, Suite 336, on the third floor of the Frontier Building, 36th and "C" Streets, Anchorage, Alaska, the following described timber:

Timber Sale SC-557 ADL 203002
Icy Cape II

All sawlogs and utility logs designated for cutting within the following protracted sections and aliquot parts: Section 32, S 1/2 Sections 33 and 34, Township 21 South, Range 19 East, Copper River Meridian; S 1/2 Section 1, Sections 2, 3, 4, 5, 11, and 12, Township 22 South, Range 19 East, Copper River Meridian; S 1/2 Section 6, Sections 7, 8, and 9, Township 22 South, Range 20 East, Copper River Meridian. There are approximately 1,028 acres of designated timber in eight (8) cutting units. An estimated 34,610 MBF of spruce and 14,570 MBF of hemlock are included.

The timber will be offered for sale without a requirement for primary manufacture. The appraisal indicates a positive stumpage value for spruce and a negative value for hemlock. Stumpage values were adjusted on the basis of the proportional total sale volume by species resulting in appraised values of $69.49 per thousand board feet (MBF) for spruce and $3.00 MBF for hemlock. Minimum acceptable total stumpage value is thus $2,405,048.90 for spruce, plus $43,710.00 for hemlock, for a total of $2,448,758.90. Bids for less than the appraised price per species will not be accepted. Determination of the highest bidder will be based upon the total stumpage value of both species.

The duration of the contract shall be six (6) years.

To qualify to bid, all bidders must submit a bid deposit of five percent of the appraised price either in cash, certified check, cashier's check or money order, in favor of the Alaska Department of Revenue. The bid deposit shall be submitted to the selling agent between 1:00 p.m. and 2:00 p.m., prevailing time, on November 17, 1983, at the Frontier Building Conference Room, Anchorage, Alaska. All bidders must have proof of a current Alaska Business License at the time of bidding. If a bidder is acting as an agent for an individual, partnership, corporation or other legally established firm, the bidder must submit a notarized letter attesting to that fact or a valid power-of-attorney, to the selling agent with his bid deposit.

The Division will not accept a bid submitted with any condition, qualification, or alteration of the terms as specified in this Notice of Sale, the Sale Prospectus, or the contract, or which is otherwise not in accordance with law.

The State reserves the right to waive minor technical defects in this advertisement and to reject any or all bids.

The sale and cutting and removal of timber shall be carried out under the authority of the Alaska Statutes, Sections 38.05.020 through 38.05.120; the Alaska Administrative Code, Sections 11 AAC 71.005 through 11 AAC 71.350 and Sections 11 AAC 71.900 through 11 AAC 71.910 referred to as the "Timber and Material Sale Regulations", 11 AAC 95.010 through 11 AAC 95.180 referred to as the "Forest Practices Regulations", and 11 AAC 95.400 through AAC 95.490 referred to as the "Forest Fire Protection Regulations."

A copy of the contract, the prospectus, the appraisal, and the cruise report can be obtained from the Alaska Division

of Forestry, at: Southcentral District Office, Pouch 7-005, Anchorage, Alaska 99510, telephone 276-2653; Southeast District Office, Pouch M, Juneau, Alaska 99801, telephone 465-2433; State Forester's Office, Pouch 7-005, Anchorage, Alaska 99510, telephone 276-2653; or the Northcentral District Office, 4420 Airport Way, Fairbanks, Alaska 99701, telephone 479-2243.

/s/ Joseph F. Wehrman
Joseph F. Wehrman, III, District Forester
Southcentral District
Division of Forestry
October 10, 1983

MEMORANDUM

State of Alaska

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF FORESTRY

TO: ESTHER WUNNICKE
Commissioner

FROM: JOHN L. STURGEON
State Forester

DATE: October 11, 1983

FILE NO: 3140.6

TELEPHONE NO: 265-4465

SUBJECT: Primary Manufacturing Policy for Icy Cape #2, Decision Memorandum #8

Statement of Issue:

Will primary manufacturing be required on the 49.2 million board foot second Icy Cape sale?

Background:

The State of Alaska has had a primary manufacture policy since statehood. In 11AAC 71.230 (a) it states that the director will, at his discretion, require that primary manufacture of timber removed under this chapter be accomplished within the state to the extent consistent with law. The State's policy has come under increasingly intensive review. In December 1981, the United States District Court for the District of Alaska held that the Alaska Statute authorizing the imposition of certain conditions on the sale of State-owned timber (primary manufacture) violates the commerce clause of the United States Constitution. On December 1, 1982, the Ninth Circuit Court of Appeals reversed the District Court's finding, thereby declaring that Alaska does have the authority to require primary manufacturing of timber harvested off its lands.

In September 1983, a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit was filed by Southcentral Timber Development, Inc., in the Supreme Court of the United States. The Solicitor General has filed, at the request of the Supreme Court, a brief as amicus curiae supporting Southcentral's request for a writ of certiorari. A writ of certiorari was granted on October 11, 1983 by the U.S. Supreme Court.

Issues:

1. The purpose of Primary Manufacturing is to encourage the development of a forest products industry in the State, which, in turn, strengthens our economy and creates long-term employment.
2. The USFS's primary manufacturing policy has been successful in creating three large mills in Southeast Alaska.
3. A logging and sawmilling operation generally creates 6.5 more person-hours of work per thousand board foot than by logging and round log exporting.
4. Local mills are assured of raw material, and jobs already in processing plants are protected.
5. A remote timber sale that is not economically feasible with primary manufacturing would not sell, and, therefore, Alaskan jobs would be lost (approximately 70 at Icy Bay).
6. Even without primary manufacturing, a portion of the timber is generally not of export quality (20-30%) and must receive some form of in-state processing.
7. Round log export of State timber will be in direct competition with private (Native corporations) timber owners in a currently limited market.
8. Primary manufacturing policy limits the options of the logging industry in marketing their products on the world market.

9. Requiring primary manufacturing substantially reduces the revenues to the State (approximately *$2,400,00* with round log export and *$216,000* with primary manufacturing.)

Sale Facts:

The Icy Cape area has some unique characteristics that affect the economics of a timber sale. These factors include: the high cost of capital improvements (bridges, camp, jetty, roads, etc.); operating on the open ocean, which makes the business very risky; and, finally, the extreme distance from a milling facility, which, of course, sustantially increases transportation costs. These factors combined with poor market conditions were the major contributors to the deficient appraisal (weighted average of minus $158.94) when calculated with primary manufacturing required. Not requiring primary manufacturing and allowing round log export resulted in positive stumpage with a weighted appraised price of $49.54 per thousand board foot. *Options:*

1. *100% Primary Manufacturing* - Since the appraisal came to a negative value for both spruce and hemlock, the stumpage rates will be our minimums of $5.00 for spruce and $3.00 for hemlock per thousand board foot. This will result in a revenue return to the State of approximately $216,480 based on the 49.2 million board feet. Two Board of Forestry members supported this option.

2. *Priority Bidding* This will allow the market place to decide between primary manufacture or export. The sale would be offered first with a stumpage rate based on the requirement of primary manufacturing. If no bids were received, it would then be reoffered with a stumpage rate based on export prices. Five Board of Forestry members supported this option.

3. *Open Market* - No primary manufacturing required with round log export allowed. Stumpage would be based on export prices and, in this case, be a positive value for both spruce and hemlock. Based on a weighted appraised price of $49.54 per thousand board foot, the revenue return to the State will be approximately $2,440,000. One Board of Forestry member supported this option.

Recommended Action:

Normally the State would require primary manufacturing; however, we feel Icy Cape is in a unique position. The difference between the negative and positive values in the appraisal came about because of higher towing charges and manufacturing costs associated with primary manufacturing. Assuming our apporaisal is accurate, it is very questionable whether any operator could survive if primary manufacturing were required with today's market. In addition, since the U.S. Supreme Court granted a writ of certiorari, it is very likely that an injunction would be filed stopping the sale with the primary manufacturing requirement. Thus, Option No. 1 is not recommended.

Option No. 2 would allow the market place to decide the issue. If there is a market for in-state use of the timber, an operator will buy the sale; if not, it will go unsold. This option puts an extreme burden on a prospective purchaser to be able to go either way, thereby eliminating some operators from bidding. This, in addition to the reasons outlined for Option No. 1, causes us not to recommend Option No. 2.

It is recommended that we do go with Option No. 3. Besides answering the negative aspects of the other options, it will bring in more revenue over the life of the sale during the time of declining oil revenues. It is my opinion that requiring primary manufacturing for this sale will not help develop a local industry, nor would it create any significant new jobs. However, allowing round log export *will* assure that the 70+ people currently working at Icy Bay will remain employed. When primary manufacturing was required under Icy Bay#1 and after that requirement was removed, it did not change the net number of people employed. In short, requiring primary manufacturing did not create any additional or long term jobs.

The following points are those I used to make my recommendation.

1) *Market Not Limited*

Allowing round log export does not preclude an operator from selling logs instate to receive primary manufacturing. The appraisal figures in roughly 30% of the total sale volume as receiving primary manufacture - primarily the lower grades, but with 5% to 20% of the higher grades included to increase marketability.

2) *Competitive Sale*

Since the sale is appraised to be competitive, anyone in the private sector can bid on it. This gives a much larger segment of the forest products industry the opportunity to bid on the sale.

3) *Increased Revenue*

The revenue to the State by not requiring primary manufacturing will be substantially increased from $216,000 to $2,440,000.

4) *Jobs Are Not Lost*

The number of Alaskan jobs with or without primary manufacturing for this sale, based on past records, is the same. Requiring primary manufacturing could mean the direct loss of 70 jobs in Alaska. Requiring primary manufacturing in this case violates the basic principles which the policy of primary manufacturing are build: a) create jobs; b) build the forest products industry.

If this sale were closer to existing manufacturing facilities or had the potential to create long term jobs, my recommendation would be different. Even if it were possible, manufacturing the logs on site into cants would not create any additional or long-term jobs. Attempts to construct a manufacturing facility at Icy Bay have not proven feasible because it is located in a "pristine air quality" zone. This means that wate products could not be burned in the Icy Bay area.

5) *Integrity of DNR's Timber Program*

The Cape Yakataga area has an annual allowable cut of approximately 20 MMBF. The government in both good and poor markets has traditionally provided timber in an even flow. This has been done even during low markets. The government should not only look at revenue received but jobs provided. Delaying the sale would interrupt this supply and put an unnecessary burden on the timber industry.

6) *Protection of State's Investment*

Through Icy Bay I the State has secured many capital improvements such as the jetty, culverts, bridges, roads, camp, etc. A delay of the sale would put these capital improvements in jeopardy due to a lack of maintenance. Continuing the sale would protect the millions of dollars the State has invested.

7) *Commitment to Development of a Forest Industry Not Lessened*

This recommendation is only for this particular sale and is not a show of a lack of commitment on the DOF's part to help build the forest products industry. A unique set of circumstances leads to this decision. The next sale may very well have the requirement of primary manufacturing if these same circumstances change.

8) *Legality of Primary Manufacturing Uncertain*

The Solicitor General's Brief of September 14, 1983 stated it believed the Ninth Circuit Court was in error when it declared primary manufacturing legal for states. Given this strong recommendation, the Supreme Court has accepted the case. This casts grave doubts on the principle of primary manufacturing for states. This, in itself, is not enough to form a recommendation to allow round log export, but, with the other factors added, it must be considered in any decision on whether to require primary manufacturing or to allow round log export.

In closing let me reiterate that this recommendation is only for this particular sale, at this point in time. If market conditions improve prior to the selling of Icy Bay III, the recommendation to not require primary manufacturing would be examined very closely.

Recommend concurrence:

/s/ James K. Barnett	10-11-83
James K. Barnett, Deputy Commissioner	Date
/s/ Robert D. Arnold	10/14/83
Robert D. Arnold, Deputy Commissioner	Date

I Concur:

/s/ Esther C. Wunnicke	Oct 17, 1983
Esther C. Wunnicke, Commissioner	Date